

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

JOHN R. PILCHER, an individual, and JRP
LAND, LLC., a Washington limited liability
corporation,

Petitioners,

v.

CITY OF SPOKANE, a Washington municipal
corporation, and WASHINGTON STATE
DEPARTMENT OF ECOLOGY, a Washington
state agency,

Respondents.

Case No. 10-1-0012

FINAL DECISION AND ORDER

I. SYNOPSIS

Petitioners challenged certain amendments to the City of Spokane Shoreline Master Program including the adoption of a 200 foot wide shoreline buffer and certain Environment Designations affecting Petitioners' property. The Board determined that the City of Spokane Shoreline Master Program Amendments, as adopted by the City of Spokane and approved by the Department of Ecology, comply with (1) the policies, goals, and provisions of the Shoreline Management Act, including RCW 90.58.020, and (2) the Shoreline Master Program Guidelines in WAC Chapter 173-26.

II. PROCEDURAL HISTORY

On September 24, 2010, Petitioners filed their Petition for Review challenging certain amendments to the City of Spokane Shoreline Master Program. On October 4, 2010, Respondent City of Spokane filed its motion to dismiss the Petition for Review alleging that Petitioners failed to name and serve the State of Washington Department of Ecology within the 60-day period for appeal. On October 6, 2010, Petitioners filed their Amended Petition

1 for Review to include the Washington State Department of Ecology as an additional
2 Respondent. On October 12, 2010, the Department of Ecology filed its motion to dismiss the
3 Amended Petition for Review. On December 8, 2010, the Board denied the motions to
4 dismiss. On December 30, 2010, the Board granted Petitioners' Motion to Supplement the
5 Record as to three of four supplemental items and denied the fourth item.

6 The Hearing on the Merits (HOM) was held on February 10, 2011, in Spokane, Washington.
7 Board members Raymond Paoella, Joyce Mulliken, and William Roehl were present, Board
8 Member Paoella presiding. Petitioners John R. Pilcher and JRP Land, LLC were
9 represented by Taud Hume and Stacy Bjordahl; Respondent City of Spokane was
10 represented by James Richman and Michael Piccolo; Respondent Washington State
11 Department of Ecology was represented by Assistant Attorney General Thomas Young.

12 **III. PRELIMINARY MATTERS**

13 On January 25, 2011, Spokane filed a Declaration of James Richman RE: Status of
14 Petitioners' Development Proposal. The Board accepted this declaration attaching certain
15 relevant documents because this supplemental information would be of substantial
16 assistance. On February 2, 2011, Petitioners filed a declaration of John R. Pilcher, offering
17 new information based on conversations with individuals not involved in the case. The
18 Board determined that this declaration contains hearsay information of questionable
19 reliability and would not be of substantial assistance to the Board. Therefore, the Board
20 rejected the Pilcher Declaration.

21 **IV. BURDEN OF PROOF/SCOPE OF REVIEW**

22 The statutory provisions for appealing a Shoreline Master Program Amendment to the
23 Growth Management Hearings Board (GMHB) are found in RCW 90.58.190(2), RCW
24 36.70A.280, and RCW 36.70A.290. The appellant has the burden of proof in all appeals to
25 the GMHB under RCW 90.58.190(2).¹

26 ¹ RCW 90.58.190(2)(d).
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1 RCW 90.58.190(2)(b) provides:

2 If the appeal to the growth management hearings board concerns shorelines,
3 the growth management hearings board shall review the proposed master
4 program or amendment solely for compliance with the requirements of this
5 chapter, the policy of RCW 90.58.020 and the applicable guidelines, the internal
6 consistency provisions of RCW 36.70A.070, 36.70A.040(4), 35.63.125, and
7 35A.63.105, and chapter 43.21C RCW as it relates to the adoption of master
8 programs and amendments under chapter 90.58 RCW.²

9 RCW 90.58.190(2)(c) provides:

10 If the appeal to the growth management hearings board concerns a shoreline of
11 statewide significance, the board shall uphold the decision by the department
12 unless the board, by clear and convincing evidence, determines that the decision
13 of the department is inconsistent with the policy of RCW 90.58.020 and the
14 applicable guidelines.³

15 Under these two different subsections of RCW 90.58.190(2), the scope of review by the
16 Growth Management Hearings Board is different based on whether the appeal concerns
17 “shorelines” or concerns “shorelines of statewide significance.”⁴ The terms “shorelines” and
18 “shorelines of statewide significance” have mutually exclusive definitions.

19 Under RCW 90.58.030(2)(c), “Shorelines of the state” are the total of all “shorelines” and
20 “shorelines of statewide significance” within the state. The statutory term “shorelines” is
21 defined in RCW 90.58.030(2)(d) to include all of the water areas of the state and their
22 associated shorelands EXCEPT “shorelines of statewide significance.” The term “shorelines
23 of statewide significance” is defined in RCW 90.58.030(2)(e).

24 In appeals concerning a Shoreline of Statewide Significance, the Legislature has: (1)
25 narrowed the scope of GMHB review by excluding GMA internal consistency and SEPA as

26 ² Emphasis added.

³ Emphasis added.

⁴ As a creature of statute, the power and authority of the GMHB is limited to review of those matters expressly
delegated by statute – the GMHB has only those powers expressly granted or necessarily implied by statute.
Viking Properties, Inc. v. Holm, 155 Wn. 2d 112, 129 (2005); *Skagit Surveyors and Engineers, LLC v. Skagit*
County, 135 Wn. 2d 542, 564 (1998).

1 potential bases for compliance review, and (2) prescribed a high evidentiary standard –
2 “clear and convincing evidence.”⁵ Although the GMHB has been delegated general authority
3 to find a state agency, county, or city either “in compliance” or “not in compliance” with the
4 requirements of the GMA or Chapter 90.58 as it relates to the adoption or amendment of
5 shoreline master programs, that general review authority has been circumscribed by the
6 specific provisions of RCW 90.58.190(2)(c) for appeals concerning a Shoreline of Statewide
7 Significance. In contrast, for appeals concerning Shorelines, the GMHB has been delegated
broader review authority that includes GMA internal consistency and SEPA compliance.

8 In the present case, Petitioners’ appeal relates exclusively to Latah (Hangman) Creek,
9 which is a Shoreline of Statewide Significance because it has 300 square miles of drainage
10 area.⁶ Therefore, the Board’s scope of review in this case is dictated by the narrower
11 provisions of RCW 90.58.190(2)(c) -- i.e., the Board shall uphold the decision by Ecology
12 unless the Board, by clear and convincing evidence, determines that Ecology’s decision is
13 inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.⁷

14 **V. BOARD JURISDICTION**

15 The Board finds that the Petition for Review was timely filed, pursuant to RCW 90.58.190(2),
16 RCW 36.70A.280, RCW 36.70A.290(2). The Board finds that Petitioners have standing to
17 appear before the Board, pursuant to RCW 36.70A.280(2). The Board finds that it has
18 jurisdiction over the subject matter of the petition pursuant to RCW 90.58.190(2), RCW
36.70A.280, and RCW 36.70A.290.

19 **VI. DISCUSSION OF THE ISSUES**

20 **A. SMA/GMA Statutory Framework**

21
22 ⁵ For appeals concerning Shorelines of Statewide Significance, the scope of GMHB review is narrower and the
23 evidentiary standard is enhanced, consistent with the enhanced protection of the statewide interest over the
local interest. See RCW 90.58.020 legislative findings and policies.

24 ⁶ See WAC 173-18-360(3) which applies the definition of “shorelines of statewide significance” in RCW
90.58.030(2)(e).

25 ⁷ RCW 90.58.060(1) requires Ecology to adopt guidelines for the development of Shoreline Master Programs
(SMPs) for the regulation and uses of shorelines. The SMP Guidelines are codified at WAC Chapter 173-26.

1 In enacting the Shoreline Management Act, the Legislature found that "the shorelines of the
2 state are among the most valuable and fragile of its natural resources and that there is great
3 concern throughout the state relating to their utilization, protection, restoration, and
4 preservation." Accordingly, "coordinated planning" between the state government and local
5 governments is necessary in order to protect the public interest and to prevent the inherent
6 harm in an uncoordinated and piecemeal development of the state's shorelines.⁸ RCW
90.58.020.

7 Local government has the primary responsibility for initiating SMA-required planning. RCW
8 90.58.050. While the statutory scheme provides for coordinated authority between the state
9 and local government, the state reserves ultimate control and primary authority to manage
10 shoreline development.⁹

11 RCW 90.58.080(1) provides that local governments "shall develop or amend a master
12 program for regulation of uses of the shorelines of the state consistent with the required
13 elements of the guidelines adopted by" the Department of Ecology. RCW 90.58.060(1)
14 requires Ecology to adopt guidelines for the development of Shoreline Master Programs
15 (SMPs) for the regulation and uses of shorelines. The SMP Guidelines are codified at WAC
16 Chapter 173-26.

17 Although the SMA directs each local government to develop and administer its SMP, the
18 State Department of Ecology has a pervasive, state-mandated role in the development,
19 review, and approval of local SMPs.¹⁰ Our Supreme Court has ruled that the local
20 government acts as an agent of the state in developing the SMP -- the city/county acts at
21 the instance of and, in some material degree, under the direction and control of the state.¹¹

22 ⁸ The SMA is to be broadly construed in order to protect the state shorelines as fully as possible. *Buechel v Dep't of*
23 *Ecology*, 125 Wn. 2d 196, 203 (1994).

24 ⁹ *Biggers v. City of Bainbridge Island*, 162 Wn. 2d 683, 687 (2007); *Citizens for Rational Shoreline Planning, et al.*
v. Whatcom County, 155 Wn. App. 937, 946 (2010).

25 ¹⁰ *Citizens for Rational Shoreline Planning, et al. v. Whatcom County*, 155 Wn. App. 937, 943 (2010).

26 ¹¹ *Orion Corp. v. State*, 109 Wn. 2d. 621, 643-44 (1987) [SMA created an agency relationship with state as
principal and local government as agent].

1 Ecology's statutorily-mandated involvement in the process of SMP development is
2 considerable and, ultimately, determinative – a local SMP becomes effective only upon
3 approval by Ecology.¹² Locally-developed and Ecology-approved SMPs are the product of
4 state regulation and constitute land use regulations for the various shorelines of the state.¹³

5 The GMA defines "Development Regulations" as "controls placed on development or land
6 use activities by a county or city, including, but not limited to, zoning ordinances, critical
7 areas ordinances, **shoreline master programs** . . ."¹⁴ Much of the SMP, including use
8 regulations, "shall be considered a part of the county or city's development regulations."¹⁵

9 For shorelines of the state, the statutes provide that the goals and policies of the SMA as
10 set forth in RCW 90.58.020 are added as one of the goals of the GMA as set forth in RCW
11 36.70A.020 without creating an order of priority among the 14 goals; the goals and policies
12 of a SMP "shall be considered an element of the county or city's comprehensive plan."¹⁶

13 **B. Challenged Decision**

14 On July 21, 2010, the City of Spokane (Spokane) passed Ordinance No. C34605 relating to
15 the Spokane Shoreline Management Program Amendments, including the adoption of a 200
16 foot wide shoreline buffer and certain Environment Designations affecting Petitioners'
17 property (Pilcher property). On July 26, 2010, the Washington State Department of Ecology
18 (Ecology) gave final approval to the City of Spokane Shoreline Master Program
19 Comprehensive Update.

20 **C. Issue 1 – GMA Planning Goals and GMA Best Available Science**

21 Is the SMP in compliance with Washington's Growth Management Act, 36.70A
22 RCW ("GMA"), specifically including RCW 36.70A.020(1)(2)(5)(6) and WAC 365-

23 ¹² RCW 90.58.090(1); *Citizens for Rational Shoreline Planning, at al. v. Whatcom County*, 155 Wn. App. 937,
24 943 (2010).

25 ¹³ RCW 90.58.100(1); *Citizens for Rational Shoreline Planning, et al. v. Whatcom County*, 155 Wn. App. 937,
26 945 (2010).

¹⁴ RCW 36.70A.030(7). Emphasis added.

¹⁵ RCW 36.70A.480(1).

¹⁶ Id.

1 195 *et seq.*; and Washington's Shoreline Management Act, 90.58 RCW ("SMA"),
2 specifically including the requirements of RCW 90.58.100 and WAC 173-26-176;
3 when it fails to provide adequate justification for the increased buffer widths related
to both (a) the JRP Land Property, and (b) all other shoreline environments within
the City?

4 RCW 90.58.190(2)(c) limits the scope of GMHB review by providing that the Board shall
5 uphold the decision by the Department of Ecology unless the Board, by clear and
6 convincing evidence, determines that Ecology's decision is inconsistent with the policy of
7 RCW 90.58.020 and the applicable guidelines. The GMHB is precluded by statute from
8 potentially finding noncompliance based on RCW 36.70A.020(1)(2)(5)(6) [GMA Planning
9 Goals] and WAC 365-195 *et seq.* [GMA Best Available Science rules]. Because Issue 1 in
10 part presents arguments outside of the scope of review under RCW 90.58.190(2)(c), the
11 Board lacks statutory authority to consider those arguments and they must be dismissed.

12 Moreover, the Board deems issue statements relating to RCW 90.58.100 and WAC 173-26-
13 176 as abandoned since Petitioners' briefs contain no argument as to RCW 90.58.100 and
14 WAC 173-26-176.

15 Further, Petitioners assert that the "City's methodologies for establishing buffer widths is
16 arbitrary and unsupported by the record, and the SMP fails to provide adequate justification
17 for buffer widths." But Petitioners, who have the burden of proof in this case, make factual
18 allegations that are unsupported by citations to the record, and Petitioners also fail to cite
19 any provisions of the SMA or SMA Guidelines to support this assertion.

20 Petitioners cannot satisfy their burden of proof on Issue 1 for multiple reasons: arguments
21 falling outside the statutory scope of review that must be dismissed, issue statement
22 arguments that are unbriefed and therefore abandoned, and arguments in the brief
23 unsupported by factual citations to the record or by legal citations to the SMA.

24 **D. Issue 2 – Channel Migration Zone/200 Foot Shoreline Buffer:**

1 Is the SMP in compliance with state regulations, including WAC 365-195 *et seq.*,
2 RCW 90.58.100 and WAC 173-26-221; when the City alleged, in contravention of
3 Washington law, the existence of a Channel Migration Zone as the sole justification
4 for an increased buffer on the JRP Land Property?

5 Petitioners' reference to WAC 365-195 *et seq.* [GMA Best Available Science rules] in Issue
6 2 cannot be considered by the Board, as it falls outside the statutory scope of review set by
7 RCW 90.58.190(2)(c). Petitioners' briefing and argument under Issue 2 cited the Flood
8 Hazard Reduction provisions in WAC 173-26-221(3). Thus, the Board's scope of review
9 under Issue 2 is limited to whether the SMP provisions on Channel Migration Zones and
10 shoreline buffers comply with RCW 90.58.100 and WAC 173-26-221(3) -- Flood Hazard
11 Reduction.

12 Applicable Law

13 RCW 90.58.100(2)(h) provides that a Shoreline Master Program shall include "[a]n element
14 that gives consideration to the statewide interest in the prevention and minimization of flood
15 damages." WAC 173-26-221(3) sets forth the principles and standards that apply to the
16 required "Flood Hazard Reduction" element of the Shoreline Master Program.

17 WAC 173-26-221(3)(b) Principles, provides in pertinent part as follows:

18 The dynamic physical processes of rivers, including the movement of water,
19 sediment and wood, cause the river channel in some areas to move laterally, or
20 "migrate," over time. This is a natural process in response to gravity and topography
21 and allows the river to release energy and distribute its sediment load. **The area
22 within which a river channel is likely to move over a period of time is referred
23 to as the channel migration zone (CMZ) or the meander belt.** Scientific
24 examination as well as experience has demonstrated that interference with this
25 natural process often has unintended consequences for human users of the river
26 and its valley such as increased or changed flood, sedimentation and erosion
patterns. It also has adverse effects on fish and wildlife through loss of critical
habitat for river and riparian dependent species. **Failing to recognize the process
often leads to damage to, or loss of, structures and threats to life safety.**

Applicable shoreline master programs should include provisions to **limit
development and shoreline modifications that would result in interference
with the process of channel migration that may cause significant adverse**

1 **impacts to property or public improvements and/or result in a net loss of**
2 **ecological functions** associated with the rivers and streams. (See also (c) of this subsection.)

3 The channel migration zone should be established to **identify those areas with**
4 **a high probability of being subject to channel movement** based on the historic
5 record, geologic character and evidence of past migration. It should also be
6 recognized that past action is not a perfect predictor of the future and that human
and natural changes may alter migration patterns. Consideration should be given to
such changes that may have occurred and their effect on future migration patterns.

7 For management purposes, the extent of likely migration along a stream reach
8 can be identified using evidence of active stream channel movement over the past
9 one hundred years. Evidence of active movement can be provided from historic and
10 current aerial photos and maps and may require field analysis of specific channel
11 and valley bottom characteristics in some cases. A time frame of one hundred years
was chosen because aerial photos, maps and field evidence can be used to
evaluate movement in this time frame.

12 In some cases, river channels are prevented from normal or historic migration by
13 human-made structures or other shoreline modifications. The definition of channel
14 migration zone indicates that in defining the extent of a CMZ, local governments
15 should take into account the river's characteristics and its surroundings. Unless
otherwise demonstrated through scientific and technical information, **the following
characteristics should be considered when establishing the extent of the CMZ
for management purposes:**

16 • Within incorporated municipalities and urban growth areas, **areas separated**
17 **from the active river channel by legally existing artificial channel constraints**
18 **that limit channel movement should not be considered within the channel**
migration zone.

19 • All areas separated from the active channel by a legally existing artificial
20 structure(s) that is likely to restrain channel migration, including transportation
21 facilities, built above or constructed to remain intact through the one hundred-year
flood, should not be considered to be in the channel migration zone.

22 • In areas outside incorporated municipalities and urban growth areas, channel
23 constraints and flood control structures built below the one hundred-year flood
24 elevation do not necessarily restrict channel migration and should not be considered

1 to limit the channel migration zone unless demonstrated otherwise using scientific
2 and technical information.¹⁷

3 WAC 173-26-221(3)(c) establishes required SMP standards for flood hazard reduction and
4 provides *inter alia*:

5 Development in flood plains should not significantly or cumulatively increase
6 flood hazard or be inconsistent with a comprehensive flood hazard management
7 plan adopted pursuant to Chapter 86.12 RCW . . . New development or new uses
8 in shoreline jurisdiction, including the subdivision of land, should not be
established when it would be reasonably foreseeable that the development or
use would require structural flood hazard reduction measures within the channel
migration zone or floodway.

9 Spokane Municipal Code § 17E.030.160 states that because “the floodway is an extremely
10 hazardous area due to the velocity of floodwaters that carry debris, potential projectiles, and
11 erosion potential,” residential construction is prohibited unless certain narrow exceptions
12 apply.

13 WAC 173-26-020(7) defines "Channel Migration Zone (CMZ)" as “the area along a river
14 within which the channel(s) can be reasonably predicted to migrate over time as a result of
15 natural and normally occurring hydrological and related processes when considered with the
16 characteristics of the river and its surroundings.”

17 Board Analysis and Findings

18 Flood hazard reduction is accomplished in part by adopting shoreline buffers, within which
19 development is severely restricted.¹⁸ In addition to shoreline buffers, CMZ and floodplain
20 regulations apply to the Pilcher property.¹⁹ The CMZ had been delineated in June 2000 in
21 the Hangman (Latah) Creek Comprehensive Flood Hazard Management Plan (CFHMP)

22
23 _____
24 ¹⁷ Emphasis added.

25 ¹⁸ Spokane Municipal Code § 17E.060.720E (e.g., “New streets shall not be approved to create developable
lots in the shoreline buffer”).

26 ¹⁹ IR 462: Lower Latah Creek Buffer Assessment, page 12 (Department of Ecology 2/10/2009).

1 prepared by the Spokane County Conservation District.²⁰ The CMZ boundaries were
2 confirmed in Ecology's Lower Latah Creek Buffer Assessment (2/10/2009).²¹ Since the area
3 of property covered by the CMZ is mostly larger than the 200 foot shoreline buffer, the CMZ
4 regulations and floodplain regulations would have greater influence than the 200 foot
5 buffer.²²

6 Initially, the City proposed a uniform 200 foot shoreline buffer along Pilcher's property,
7 consistent with the buffer for most of this reach of Latah Creek.²³ Pilcher then negotiated
8 with the City a buffer reduction to 100 feet for the southern 40% of his property. Therafter,
9 Ecology required the City to adopt a 200 foot buffer on the Pilcher property in order "to
10 prevent impinging on the channel migration zone of Latah Creek."²⁴

11 Petitioners challenge the 200 foot shoreline buffer size as excessive and arbitrary.
12 Petitioners allege: (1) there are "artificial channel constraints" on the shoreline of the JRP
13 Land [Pilcher] property, in the form of concrete demolition debris in the channel and a bridge
14 with concrete footings in the creek bed, and (2) "the entire area considered by Ecology as
15 part of the CMZ is being currently limited by artificial channel constraints."²⁵ Ecology and
16 the City allege there are no legally existing artificial channel constraints that limit channel
17 movement and that the 200 foot buffers are necessary to protect life, property, and public
18 health and safety from flood hazards.

19 Petitioners retained Dr. John Buchanan, a fluvial geomorphologist and professor of geology
20 at Eastern Washington University, to prepare a Technical Memorandum Re: Channel
21 geomorphology at Latah Creek property (June 16, 2010).²⁶ The scope of Buchanan's tasks
22 included: (1) a review of Ecology's reports on lower Latah Creek and other relevant

23 ²⁰ SR 3, attached to Department of Ecology's Prehearing Brief.

24 ²¹ IR 462: Lower Latah Creek Buffer Assessment, pages 12-17 (Department of Ecology 2/10/2009).

25 ²² IR 462: Lower Latah Creek Buffer Assessment, page 12 (Department of Ecology 2/10/2009).

26 ²³ IR 448, attached to Department of Ecology's Prehearing Brief.

²⁴ IR 488, attached to Department of Ecology's Prehearing Brief (Attachment B, Required Changes).

²⁵ Petitioners' Prehearing Brief (Jan. 4, 2011), pp. 13-14.

²⁶ CR 356, attached to Petitioners' Prehearing Breif [sic].

1 literature, (2) a site visit and visual examination of the subject property, and (3) preparation
2 of a summary report of his opinions regarding the designated 200 foot setback. In this
3 Technical Memorandum, Dr. Buchanan opines that Ecology's Buffer Assessment has a
4 "significant shortcoming of analysis" because the Buffer Assessment has "no elaborative
5 discussion" of existing historical rip-rap and the role it plays in constraining the channel.
6 Buchanan summarizes and concludes, in relevant part, as follows:

7 It is my opinion that, while there may be some anticipated erosion of the right
8 bank at the upstream end of the subject property, I would not expect a major
9 incursion of a meander bend into the southern portion of the property. Because
10 of the long-term stability of the channel (evidenced by the 103 year age of
11 farmhouse and time sequenced aerial images) and the presence of existing
12 historic armoring, the CMZ seems inappropriately and excessively delineated in
13 this portion of the site. . . .

14 I would urge a thorough and complete examination and assessment of the
15 existing historic channel armoring at the southern end of the subject property by
16 a qualified engineer. The performance of this artificial armoring under high flow
17 conditions should be carefully characterized. Modification and/or additional
18 armoring material will likely be required to be placed in this area to afford greater
19 bank protection during high stream flows and to protect the upstream end of the
20 subject property.²⁷

21 Ecology's fluvial geomorphologist, Dr. Patrica Olsen, prepared the Lower Latah Creek
22 Buffer Assessment (February 10, 2010) together with a Buffer Assessment Addendum (May
23 17, 2010). Dr. Olson prepared several GIS overlays depicting the location of the Ordinary
24 High Water Mark (OHWM), FEMA floodway and floodplain, channel migration zone, and
25 SMP buffer, on the Pilcher property.²⁸ Dr. Olsen concluded, in relevant part, as follows:

26 Comparison between the years shows the channel continues to migrate,
27 particularly upstream of the railroad crossing bordering the Pilcher property
28 (Figure1).

29 Lower Latah Creek (downstream of Rock Creek) channel migration zone was
30 mapped as part of the Hangman (Latah) Creek Comprehensive Flood Hazard
31 Management Plan (CFHMP).

32 ²⁷ Id. at page 5.

33 ²⁸ IR 462 (Figures 9–13).
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1 The CMZ boundary, for the most part, is landward of the 200 foot buffer. The
2 floodway is similar to the revised 200 foot boundary except in the upstream
3 portion by existing structures (Figure 9). The CMZ regulations and floodplain
regulations would have greater influence than the 200 foot buffer.

4 The channel migration area extends further landward than the 200 foot buffer.

5 The 1958, 1995, and 2007 digitized active channels show that the channel
6 migrates in this reach (Figure 11).

7 The Pilcher property has both erodible soil and geologic hazards which suggests
8 other constraints on development.

9 Active erosion occurred following the January 8, 2009 flood.

10 The LiDAR DEM contours also indicate a channel that was not seen in the air
11 photos (Figure 10 and 11).²⁹

12 Figures 9, 10, and 11 of the Buffer Assessment show a relic channel extending landward
13 and beyond the 200 foot buffer across much of the Pilcher property.³⁰ In a Buffer
14 Assessment Addendum, Dr. Olson stated this relic channel could be an avulsion path; also,
15 she included a photograph and text stating that riprap/demolition debris is no longer
16 protecting the upstream bank, which is eroding.³¹ According to Olson, Pilcher had not
demonstrated that this "obviously failed riprap" was adequate to protect life and structures.³²

17 The Department of Ecology made Findings of Fact that the proposed buffer is based on
18 good science, and "[a] detailed review of the channel migration zone by Ecology's expert in
19
20
21

22 ²⁹ IR 462, Lower Latah Creek Buffer Assessment -- pages 3, 12-17, attached to Department of Ecology's
23 Prehearing Brief.

³⁰ Id. at p.13.

24 ³¹ IR 461, Addendum to Assessment of CMZ on Pilcher Property, attached to Department of Ecology's
Prehearing Brief.

25 ³² Department of Ecology's Prehearing Brief (Jan. 21, 2011), Attachment IR 460 -- Email from Ecology
Hydrogeologist Patricia Olsen, PhD (June 21, 2010).

1 fluvial geomorphology confirmed the channel migration zone and supports the originally
2 proposed [200 foot] buffer."³³

3 The narrow legal issue presented here by Petitioners is whether the SMP Channel Migration
4 Zone and shoreline buffer comply with the WAC 173-26-221(3) principle that **areas**
5 **separated from the active river channel by legally existing artificial channel**
6 **constraints that limit channel movement should not be considered within the channel**
7 **migration zone.**

8 To summarize the relevant evidence: Although Petitioners' consultant was critical of
9 Ecology's channel migration analysis, there is no evidence in the record that he performed
10 any separate channel migration analysis. He opined that there may be some erosion of the
11 creek bank, additional armoring material will likely be required to protect the creek bank, and
12 further assessments were recommended. He concluded that he did not expect a major
13 incursion of a meander bend into the southern portion of Pilcher's property, but he did not
14 state a specific conclusion as to whether areas of Pilcher's property are separated from the
15 active river channel by legally existing artificial channel constraints that limit channel
16 movement. Ecology's fluvial geomorphologist determined that the upstream bank was
17 eroding and the obviously failed riprap was not adequate to protect life and structures. Also,
18 there is no evidence that the riprap is legally existing, but in any case the riprap is not
19 adequate to limit channel movement – the Channel Migration Zone extends landward
20 beyond the 200 foot buffer.

21 After considering the facts and evidence in the record, together with legal briefing and
22 argument by the parties, the Board finds and concludes that Petitioners have failed to
23 satisfy their burden of proof to show, by clear and convincing evidence, that the City's and
24 Ecology's decisions on amendments to the SMP did not comply with RCW 90.58.100 and
25 WAC 173-26-221. The Board further finds that there is substantial evidence in the record to

26 ³³ IR 487, Attachment A: Findings and Conclusions for Proposed Amendments to the City of Spokane
Shoreline Master Program (10/1/2009), attached to Department of Ecology's Prehearing Brief.
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1 support the City's and Ecology's determination that the CMZ is, for the most part, more than
2 200 feet landward of Latah Creek. There is also substantial evidence in the record to
3 support Ecology's Findings of Fact and requirement for a 200 foot buffer along the right
4 bank (east bank) of Latah Creek to prevent impinging on the Channel Migration Zone of
5 Latah (Hangman) Creek. The City's and Ecology's decisions regarding the CMZ and 200
6 foot buffer are consistent with the policy of RCW 90.58.020, and with the Shoreline Master
Program Guidelines in WAC Chapter 173-26.

7 **E. Issue 3 – Ecology's Comments on Proposed SMP Amendments**

8 Is the SMP in compliance with the procedural requirements of RCW 90.58.090,
9 when the Department of Ecology strategically delayed the issuance of its comments
on the City's SMP well beyond the allowable statutory limits?

10 RCW 90.58.190(2)(c) provides that the Board shall uphold the decision by the Department
11 of Ecology unless the Board, by clear and convincing evidence, determines that Ecology's
12 decision is inconsistent with the policy of RCW 90.58.020 and the applicable guidelines.
13 Petitioners have not briefed nor alleged: (1) any inconsistency with the policy of RCW
14 90.58.020 or (2) any inconsistency with the applicable SMP Guidelines in WAC Chapter
15 173-26. Rather, Petitioners' Issue 3 is limited to asserting non-compliance with the
16 procedural requirements of RCW 90.58.090. Alleged non-compliance with RCW 90.58.090
17 falls outside the statutory scope of review by the GMHB under RCW 90.58.190(2)(c).
18 Therefore, the Board lacks statutory authority to consider this issue, and Issue 3 must be
dismissed.

19 **F. Issue 4 – GMA Internal Consistency Requirements**

20 Is the SMP in compliance with the requirements of the GMA (including RCW
21 36.70A.100, RCW 36.70A.480(1), RCW 36.70A.481) when it is inconsistent with (a)
22 the City's Comprehensive Plan (including, but not limited to Comprehensive Plan
23 Chapter 6 – Housing, Chapter 8 – Economic Development, Chapter 9 – Natural
24 Environment, Chapter 17 Land Use); (b) the City's development regulations
including, but not limited to the City's zoning code (*e.g.* SMC 17C.110 *et seq.* and
SCM 17C.210 *et seq.*); and (c) internally inconsistent.

1 RCW 90.58.190(2)(c) limits the scope of GMHB review by providing that the Board shall
2 uphold the decision by the Department of Ecology unless the Board, by clear and
3 convincing evidence, determines that Ecology's decision is inconsistent with the policy of
4 RCW 90.58.020 and the applicable guidelines. Since Issue 4 concerns a Shoreline of
5 Statewide Significance, the GMHB is precluded by statute from considering noncompliance
6 based on GMA internal consistency. Since Issue 4 presents exclusively GMA consistency
7 arguments, the Board lacks statutory authority to consider this issue, and this issue is
8 dismissed.

9 **G. Issue 5 – Urban Conservancy and Natural Designations**

10 Is the SMP in compliance with the requirement of the WAC 173-26-211, where it
11 incorrectly categorized the JRP Land Property as Urban Conservancy and Natural?

12 Issue 5 refers to WAC 173-26-211, which require jurisdictions to include Environment
13 Designations in the SMP. This Ecology guideline presents a recommended classification
14 system consisting of six basic environments. Petitioners clearly disagree with the City's and
15 Ecology's Environment Designations of Urban Conservancy and Natural. But Petitioners
16 provide no argument as to how the SMP amendments are inconsistent with the
17 requirements of WAC 173-26-211. After reviewing the City's action designating parts of the
18 property Urban Conservancy and Natural, and Ecology's approval thereof, the Board cannot
19 find any inconsistency with WAC 173-26-211. Therefore, Petitioners have failed to satisfy
20 their burden of proof as to Issue 5.

21 **VII. ORDER**

22 The Board determines that the City of Spokane Shoreline Master Program Amendments, as
23 adopted by the City of Spokane and approved by the Department of Ecology, comply with
24 (1) the policies, goals, and provisions of the Shoreline Management Act, including RCW
25 90.58.020, and (2) the Shoreline Master Program Guidelines in WAC Chapter 173-26.

1 Entered this 22nd day of March, 2011.

2
3 Raymond L. Paoella, Board Member

4
5 Joyce Mulliken, Board Member

6 Concurring opinion:

7 I concur with the analysis and conclusions set forth in the Final Decision and Order with the
8 sole exception of the determination that the Petition For Review was timely filed. As stated
9 in the dissent submitted with the Order Denying Motions To Dismiss³⁴, the Petition was not
10 timely filed due to the failure of the Petitioners to name the Department of Ecology as a
11 respondent within the 60 day time requirement set forth in either RCW 36.70A.290(2) or
12 RCW 90.58.190(2).

13 William P. Roehl, Board Member

14 Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of
15 this Order to file a motion for reconsideration. The original and four copies of a motion for
16 reconsideration, together with any argument in support thereof, should be filed with the Board by
17 mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration
18 directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of
19 the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The
20 filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

21 Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to
22 superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be
23 instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05
24 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order
25 shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General,
26 and all parties within thirty days after service of the final order, as provided in RCW 34.05.542.

Service on the Board may be accomplished in person or by mail, but service on the Board means
actual receipt of the document at the Board office within thirty days after service of the final order. A
petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW
34.05.010(19).

34 Dated December 8, 2010